**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | |
| Unbundled Access to Network Elements | WC Docket No. 04-313 |
| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | CC Docket No. 01-338 |

# RESPONSE OF SBC COMMUNICATIONS INC. TO PETITIONS FOR CLARIFICATION AND/OR RECONSIDERATION


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June 6, 2005

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## INTRODUCTION AND SUMMARY

**I.** The *Triennial Review Remand Order* ("*TRRO*") requires ILECs to unbundle high-capacity loops and transport in "the overwhelming majority of markets."[1] Thus, for example, despite the existence of fiber-based collocation, and thus facilities-based competition, in more than 40% of the SBC wire centers with 5,000 or more business lines, *see TRRO* ¶ 120 n.340, the Commission provided no unbundling relief *at all* for DS1 or DS3 facilities in the vast majority of those wire centers, restricting such relief to the small percentage of wire centers that have extremely high line density and/or that already have multiple facilities-based competitors.

For the CLECs, however, even that expansive access is not enough. They raise a host of claims designed to expand their rights of access to high-capacity facilities even further, and to undo the modest limitations on those rights the *TRRO* imposes. Each of these claims, however, is badly flawed. Indeed, of the myriad high-capacity loop and transport claims raised in the petitions at issue here, only Iowa Telecom's – which properly observes that the Commission's dedicated impairment criteria are too constrained, because they ignore vast amounts of CLEC fiber that bypasses ILEC networks altogether – is worthy of reconsideration.

*First*, the Commission should reject the CLECs' claim that the Commission should limit or eliminate the 10 DS1 cap on dedicated transport circuits, which by its terms applies to all transport routes. That cap is critical to ensuring that CLECs move their DS1 traffic to a more efficient DS3 serving arrangement where their traffic warrants it, rather than forcing ILECs to bear the costs of what the Commission has expressly recognized are inefficient and uneconomic serving arrangements. And, as the Commission expressly recognized in the loop context, that

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[1] Order on Remand, *Unbundled Access to Network Elements*, 20 FCC Rcd 2533 (rel. Feb. 4, 2005) ("*TRRO*"), Separate Statement of then-Chairman Powell at 1 ("*Powell Statement*").

rationale applies regardless of whether the CLEC is entitled to obtain DS3s as a UNE on the route in question. If the DS3 *is* available as a UNE, then a CLEC that has more than 10 DS1s of traffic can move to the DS3 UNE. If the DS3 is *not* available as a UNE, that means the DS3 is capable of being competitively supplied. Either way, the CLEC must be limited to 10 DS1 transport circuits to encourage efficient serving arrangements and to ensure that CLECs do not circumvent the limitations on unbundling of DS3 and higher capacity circuits by purchasing multiple DS1s instead.

*Second*, there is no basis to eliminate the EELs eligibility requirements established in the *Triennial Review Order*.[2] Contrary to the CLECs' position here, the Commission's decision to foreclose the use of UNEs for long distance, far from being a ground to eliminate those safeguards, is the reason to keep those safeguards in place. As the Commission recognized in the *Triennial Review Order*, EELs safeguards are necessary to *enforce* the restriction on using UNEs for long distance, and nothing has changed in the interim to call that conclusion into question. Indeed, the D.C. Circuit in *USTA II*[3] reviewed and upheld the existing EELs safeguards – even though it had reversed the qualifying/non-qualifying distinction the safeguards were designed to enforce – specifically because the court expected that the Commission would on remand conclude that the long-distance market is competitive and that requesting carriers would accordingly be foreclosed from using UNEs for long distance. That is precisely what the

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

[3] *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

Commission did, and, as the D.C. Circuit anticipated, the EELs safeguards are accordingly necessary to give effect to that determination.

*Third*, the CLECs raise a host of misplaced challenges to the business-line-counting methodology the Commission articulated for applying the Commission's wire-center-based impairment criteria. But, even assuming these challenges had merit – and they do not – the CLECs ignore the fact that the Commission used the same methodology in conducting the correlative analysis that the Commission used to *establish* the impairment criteria in the first place. Thus, if the Commission is to revise its line-counting rules, it would also be required to revise its impairment criteria to conform to those new rules. And, assuming the Commission initially calculated those impairment criteria as it intended, the net result would be the same. The CLECs provide no reason why the Commission should devote its scarce resources to such a pointless exercise.

*Fourth*, the CLECs invite the Commission to abandon its disjunctive approach to transport impairment – pursuant to which a wire center is not impaired if it has a certain number of business lines *or* fiber-based collocators – and to limit unbundling only where *both* criteria are satisfied. The net effect of that request, however, would be to limit unbundling only on routes that are *already* fully competitive. The CLECs' claim thus runs headlong into the D.C. Circuit's admonition that the Commission may not "simply ignore facilities deployment along similar routes when assessing impairment." *USTA II*, 359 F.3d at 575.

*Fifth*, the Commission properly ruled that non-impaired wire centers remain that way even where the indicia of competitiveness – for example, the number of business lines in a wire center – decline in the future. The Commission's line-counting rules affirmatively exclude the millions of lines that never touch the ILEC central office. Thus, where business lines decline in a wire center, it is more than likely because *more* lines are being served by CLECs with networks that completely bypass the ILEC network. Yet the CLECs would have that pro-competitive development – in a wire center where UNEs are *not* available – result in the availability of UNEs, an outcome plainly out-of-keeping with the goals of the 1996 Act.

Nor do the pending SBC/AT&T and Verizon/MCI mergers change that analysis. As the D.C. Circuit has made clear, the Commission's role under section 251(d)(2) is to determine where facilities are "[]suitable for competitive supply." *USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003). Thus, on routes where the Commission's transport impairment criteria are satisfied today, the Commission has necessarily determined that the route is *capable* of supporting facilities-based competition, and thus that unbundling is not necessary to facilitate that result. The pending mergers have nothing to do with that determination. Rather, the routes where the Commission has determined there is no impairment will be equally suitable for competitive supply the day after the mergers as they are today.

*Finally*, as noted at the outset, Iowa Telecom properly notes that the Commission's transport impairment criteria are substantially underinclusive, insofar as they disregard competitive facilities that bypass the ILEC's network altogether. The result is that CLECs can obtain TELRIC-priced transport where they do not need it, thus discouraging competitive supply. The Commission should accordingly grant Iowa Telecom's petition to ensure that its impairment criteria capture the abundant supply of competitive fiber that does not terminate to a collocation arrangement in an ILEC central office.

**II.** The Commission properly ruled that CLECs are not impaired without access to ILEC switches, and it further held that, even if they were, the disincentive effects of mass-market unbundled local circuit switching ("ULS") – and correspondingly mass-market UNE-P – justified a "nationwide bar" on ULS. The Commission also put in place a strict transition plan that, although far longer than the ILECs had advocated and indeed double the duration the Commission had proposed, at least foreclosed CLECs from ordering *new* mass-market ULS/UNE-Ps after the effective date of the *TRRO* (March 11, 2005). The CLECs seek reconsideration on various aspects of these rulings but, as with their high-capacity loop and transport claims, they provide no valid basis for reconsideration.

*First*, the Commission properly denied access to switching for CLECs that seek to serve payphone service providers. Although APCC contends that CLECs are impaired when serving this narrow slice of the market, the Commission has already ruled that, even if that were the case, it would decline to order unbundling under the "at a minimum" clause in light of the tremendous disincentive effects caused by ULS/UNE-P. APCC does not take issue with that determination, which is dispositive here. Equally important, contrary to APCC's core contention, CLECs are not entitled to guaranteed profits on every narrow segment of the market they serve. If, as APCC urges, the Commission deems it necessary to subsidize payphone service providers (or the carriers that serve them), the Commission must attempt to do so directly under section 276 of the Act. Under no circumstance can the ILECs alone be forced to bear the burden of such subsidies through forced unbundling.

*Second*, the Commission's ULS/UNE-P transition plan need not be clarified. By its terms, the Commission's plan – which the Commission stressed "govern[s] incumbent LECs' obligations *following the effective date of th[e] Order*," *TRRO* ¶ 18 n.52 (emphasis added) – expressly "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)," *id.* ¶ 227. Indeed, the overwhelming majority of state commissions that have considered the issue – plus three federal district courts – have concluded that CLECs may not place new mass-market ULS/UNE-P orders after the effective date of the order, thus confirming the clarity of the Commission's ruling.

Nor is there any serious question about the Commission's authority to ban new ULS/UNE-P orders after the effective date of the order, without awaiting the tortuous process of amending interconnection agreements. The Supreme Court has made clear both that the Commission has plenary authority to implement the 1996 Act[4] and that it may act as necessary to "undo what is wrongfully done by virtue of its [prior] order[s]."[5] The Commission's determination to give effect to its rulings as of the effective date of the order – which was taken in fulfillment of the Commission's role as primary steward of the 1996 Act *and* to begin the process of unraveling the effects of the Commission's thrice-vacated rules creating the UNE-P – was thus doubly authorized.

The CLECs next claim that, even if they are not allowed to sign up new customers using mass-market ULS/UNE-P, they at least should be permitted to order unlimited new UNE-P lines for their existing customers. That is nonsense. The Commission's "nationwide bar" on UNE-P extends not just to new UNE-P *customers*, but to all new ULS/UNE-Ps. Any other result would permit CLECs to continue to add scores of new UNE-P lines and thus frustrate the Commission's goal of ensuring that CLECs transition off UNE-P by March 11, 2006.

*Finally*, there is no basis to the claim that the Commission should extend or otherwise modify the mass-market ULS/UNE-P transition period. The CLECs ground this claim in the assertion that a delay is necessary to avoid service disruption to existing customers. But the

[4] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999).

[5] *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965).

CLECs do not even attempt to substantiate that assertion, which is reason enough to reject their claim. Moreover, just as the Commission contemplated, many ILECs and CLECs have entered into business-to-business arrangements that include commercially negotiated alternatives to UNE-P. In fact, SBC alone has reached nearly 60 agreements (including both commercial agreements and interim arrangements) covering close to one-third of its UNE-P lines; it is currently in active negotiations with many other CLECs; and it is offering an interim UNE-P replacement to ensure that CLECs have a mechanism to avoid disruption to their customers. Finally, the CLECs have known since at least the August 2004 *Interim Order*[6] that they would be required promptly to transition away from mass-market ULS/UNE-P, and that they would be required to pay an increased rate during that transition. The *TRRO* then put in place a transition plan that is more lenient than the Commission proposed in the *Interim Order*. Extending that already lenient plan or otherwise modifying its terms would serve only to reward those CLECs that failed properly to heed the Commission's warnings and thereby encourage such irresponsible behavior in the future.

**III.** T-Mobile's renewed plea for access to UNEs to provide wireless service should be rejected out-of-hand. Indeed, T-Mobile does not even mention the D.C. Circuit's *USTA II* decision, which reversed the Commission's prior attempt to extend unbundling to wireless. As the D.C. Circuit has made clear, the Commission's own findings demonstrate that wireless is robustly competitive. The *TRRO* properly held that, in light of those findings, the Commission has no authority to allow wireless providers access to UNEs, and T-Mobile provides nothing to call that conclusion into question.

[6] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, 19 FCC Rcd 16783 (2004) ("*Interim Order*").

## DISCUSSION

### I. WITH THE EXCEPTION OF IOWA TELECOM'S PETITION, THE COMMISSION SHOULD DENY THE PETITIONS TO RECONSIDER ITS HIGH-CAPACITY AND EELS RULES

#### A. The Commission Should Adhere to the Cap on DS1 Transport Circuits In All Circumstances

**1.** The Commission's rules expressly state that "[a] requesting telecommunications carrier may obtain a maximum of 10 unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis." 47 C.F.R. § 51.319(e)(2)(ii)(B). Birch contends that there is uncertainty over whether the Commission intended this cap to apply on *all* routes where DS1 dedicated transport is available as a UNE (as the rule says), or instead solely on routes that meet the non-impairment standard *for DS3s* set out in the order. *See* Birch[7] at 2-3. There is no uncertainty. The rule means what it says: CLECs are entitled to a maximum of 10 DS1 transport circuits on any route "where DS1 dedicated transport is available." That should be the end of the matter.

Nor is it the case that the order itself conflicts with those rules. On the contrary, the Commission's decision to cap DS1 transport circuits to 10 regardless of DS3 impairment is perfectly consistent with the Commission's treatment of DS1 loops, which are capped to 10 "to any single building" irrespective of whether there is DS3 impairment in the wire center at issue. 47 C.F.R. § 51.319(a)(4)(ii); *see TRRO* ¶ 181 ("we establish a cap of ten DS1 loops that each

[7] Petition for Reconsideration of Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications, Inc., SNiP LiNK, LLC, XO Communications, Inc., and Xspedius Communications, Inc., WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Mar. 28, 2005). For convenience, each of the petitions for reconsideration and/or clarification filed by multiple parties is referred to herein by referencing the first-listed party on the petition.

carrier may obtain to a building"). Birch contends that this result – *i.e.*, limiting DS1s in *all* areas, including in areas where there is DS3 impairment – is "irrational." Birch at 3. But the Commission's logic is clear and unassailable. As the Commission explained in the DS1 loop context, "[t]he record indicates that a competitor serving a building at the ten DS1 capacity level or higher would find it economic" to move to a DS3 serving arrangement. *TRRO* ¶ 181. And, critically, that analysis does not depend on whether the DS3 serving arrangement is obtained as a UNE, or whether instead it is self-deployed or purchased from an alternative supplier. Rather, "[r]equesting carriers seeking ten or more unbundled DS1 loops are able to use DS3 loops instead, *whether those loops are competitively deployed, or are obtained as UNEs.*" *Id.* (emphasis added).

The exact same logic applies to DS1 transport. Just as with loops, a carrier serving a particular transport route "at the ten DS1 capacity level or higher would find it economic" to move to a DS3 serving arrangement. *Id.*; *see id.* ¶ 128. And, just as with loops, requesting carriers with that amount of traffic on a route are able to use DS3 transport regardless of whether that transport is "competitively deployed, or . . . obtained as [a] UNE[]." *Id.* ¶ 181. Indeed, as the Commission itself appears to have recognized, the record material the Commission relied upon to support its DS1 loop cap (which compares the cost of a DS1 loop to that of a DS3 loop) is precisely paralleled in the transport context. *Compare id.* ¶ 181 n.490 (loops) *with id.* ¶ 128 n.358 (transport). There is accordingly no principled basis for distinguishing between loops and transport when applying the limitation on DS1 circuits. In short, the DS1 cap – applied to both loops and transport – encourages CLECs to move to a more efficient DS3 serving arrangement where their capacity warrants it. Far from being "irrational," that common-sense result is necessary to encourage efficient serving arrangements.

Birch's claim to the contrary relies entirely on paragraph 128 of the order, which states: "On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain . . . to 10 circuits." *TRRO* ¶ 128; *see* Birch at 3. That is true as far as it goes: DS1 transport circuits are limited to 10 where there is no DS3 impairment. At the same time, that paragraph does not purport to *limit* application of the unambiguous rule set out at 47 C.F.R. § 51.319(a)(4)(ii). That paragraph does not, for example, state that DS1 transport circuits are limited to 10 "only" where there is no DS3 impairment, nor does not it purport to contradict the Commission's plain statement that a carrier with sufficient capacity is required to move to a DS3 serving arrangement, regardless of whether the DS3 facility is "competitively deployed, or . . . obtained as [a] UNE[]." *TRRO* ¶ 181. The Commission's limit on DS1 transport circuits thus means what it says, and it applies (as it says) on all transport routes, irrespective of DS3 impairment. Again, any other result would discourage CLECs from moving to DS3 serving arrangements that the record makes clear are "economic." *Id.*

This reading is confirmed, moreover, by the fact that, under Birch's proposed reading of the DS1 transport cap, there would be *no* limitation on DS1 transport circuits in the absence of DS3 impairment. That is, under the interpretation that Birch proposes, CLECs could obtain 12 UNE DS3 transport circuits on a route where such UNEs are available, as well as another 100 or 1,000 DS1 circuits. Such an arrangement would circumvent the cap the Commission established for UNE DS3 transport and would flout the Commission's finding that CLECs are not impaired on those routes without UNE access to more than the capacity provided by 12 DS3 transport circuits. *See* 47 C.F.R. § 51.319(e)(2)(iii)(B). The Commission plainly did not intend such an arbitrary result, thus confirming that the rule putting in place a 10 DS1 transport cap applies, as its plain language indicates, to all transport routes.

**2.** Birch, joined on this point by CTC and Cbeyond, also contends that it is "inappropriate" to limit DS1s *anywhere*, even in areas where there is *no* DS3 impairment. Birch at 4; *see* CTC[8] at 23; Cbeyond[9] at 3. Yet Birch expressly concedes that "a DS3 UNE is cheaper than multiple DS1s at a certain crossover point," Birch at 5, and, as the Commission stressed, the record squarely confirms that point, *see TRRO* ¶ 128 & n.358; *cf. id.* ¶ 181 & n.490 (making same point with respect to loops). The CLECs' argument that they should not be required to cross-over at any point thus reduces to the contention that they are entitled not only to obtain TELRIC-priced UNEs, but also that they may purchase those UNEs in serving arrangements that all parties recognize are "[in]efficient" and "[un]economic." *Id.* ¶¶ 128, 181. Nothing in the statute or sound policy permits that result.

The CLECs' primary argument to the contrary is their claim that, in order to multiplex multiple DS1 transport circuits onto a single DS3, they may be "required to install multiplexing equipment at both ends of the route," and that they might even have to collocate that equipment. Birch at 5; *see* Cbeyond at 4. But the fact of the matter is that, sometimes, to be a telephone company, you have to actually act like a telephone company. At least when it comes to a "reasonably efficient" CLEC, *TRRO* ¶ 24, multiplexing is an ordinary and unavoidable network engineering practice, and the equipment to do it is available off-the-shelf to ILECs and CLECs

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[8] Petition for Reconsideration of CTC Communications Corp., Gillette Global Network, Inc., Globalcom, Inc., Lightwave Communications, LLC, McLeodUSA, Inc., Mpower Communications Corp., PacWest Telecomm, Inc., TDS Metrocom, LLC, and US LEC Corp., WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Mar. 28, 2005) ("CTC").

[9] Petition for Reconsideration of Cbeyond Communications, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Mar. 28, 2005) ("Cbeyond").

alike. Similarly, Cbeyond itself concedes that collocation can "increas[e] efficiencies and lower[] monthly recurring costs." Cbeyond at 3. The CLECs' complaints about the costs associated with multiplexing are thus no grounds to allow them to maintain what all parties recognize are inefficient serving arrangements. Moreover, and in all events, as the CLECs appear to concede, where a CLEC is unwilling to perform the multiplexing necessary to move from multiple DS1s to a DS3, it can pay the ILEC to do so for it. *See* Birch at 5; Cbeyond at 4.[10]

Nor is it the case that the DS1/DS3 cross-over point in the Commission's rules improperly assumes away the costs of collocation necessary to multiplex DS1 transport circuits on to a single DS3. *See* Cbeyond at 3. Collocation creates not merely a cost but also a revenue opportunity, by permitting the CLEC to expand the service provided in a wire center and to use its own facilities to do so. The costs associated with collocation, moreover, are costs that *all* reasonably efficient, facilities-based competitors must incur, including those that would prefer to

[10] Cbeyond's unspecified concerns (at 4) about SBC's charges for performing this function are beside the point. Cbeyond, like any other CLEC, is perfectly capable of performing this function itself and is free to do so if it is dissatisfied with SBC's service. Likewise, Cbeyond's complaints about purported delays in establishing collocation arrangements are wholly unsubstantiated and, even assuming they had merit, should be addressed directly rather than through revisions to the Commission's unbundling rules. *See USTA II*, 359 F.3d at 570 ("[c]onsidering such narrower alternatives is essential in light of our admonition in *USTA I* that the Commission must balance the costs and benefits of unbundling"). Likewise, Cbeyond's claims about commingling (at 5 n.3) are entirely unsubstantiated – indeed, SBC is not aware of any dispute or complaint Cbeyond has raised in this context. Finally, Cbeyond's analysis of the costs of moving to DS3 facilities is predicated on the fact that it costs more to obtain a DS3 from a competitive provider than it does to purchase it from the ILEC *at TELRIC rates*. *See* Cbeyond at 4-5. That is both unsurprising and beside the point. Indeed, what is telling here is Cbeyond's admission that there are alternative transport providers "operating in Cbeyond's markets," thus confirming that Cbeyond is not impaired without unbundled access to ILEC facilities. *Id.* at 5. In any case, Cbeyond's outlandish proposed DS1 caps (of 435 where a CLEC already has a presence and 194 where it does not) are dependent on the assertion that DS3 transport is never available as a UNE. *See* Batelaan Decl. ¶¶ 5, 11. That is plainly not the case. *See Powell Statement* at 1 (noting that high-capacity transport is available "in the overwhelming majority of markets").

rely solely on DS1 circuits. And, in all events, if the CLEC does not want to incur those costs, it can always multiplex its DS1 loop traffic onto special access circuits pursuant to the Commission's commingling rules.

In sum, where CLECs have sufficient traffic to support more than 10 DS1 transport circuits on a given route, common sense and sound policy dictate that they move those circuits to a DS3 facility, and nothing stands in the way of their doing so. The Commission's DS1 transport cap, as clearly set forth in the Commission's rules, properly requires that result and should not be reconsidered.

**3.** The CLECs next contend that the DS1 transport cap should be eliminated when DS1s are purchased as part of an EEL. *See* Birch at 5; CTC at 23. That is necessary, the theory goes, to prevent CLECs from being limited to 10 DS1 EELs per wire center. *See* Birch at 6. But this argument hinges on the false assumption that CLECs cannot multiplex DS1s onto DS3 transport facilities. As the discussion above makes clear, that assumption is wrong. Again, Birch's only argument to the contrary is based on the assertion that CLECs might be required to collocate in order to perform such multiplexing. *See id.* And, again, that is no basis on which to permit CLECs to obtain DS1 serving arrangements that are concededly inefficient and uneconomic.

Relatedly, Cbeyond contends that the DS1 transport cap precludes reliance on DS1 EELs where DS3s are not available as UNEs. *See* Cbeyond at 2. This misses the point entirely. On the relatively few transport routes where DS3s are not available as UNEs, the record makes clear that there is overwhelming competitive opportunity and, in most cases, multiple alternative suppliers. *See TRRO* ¶¶ 129-130 (defining non-impairment criteria for DS3 transport). Contrary to Cbeyond's assumption, on routes with such competitive supply, the CLEC does not need the

ILEC's DS3 facilities – indeed, that is the very core of the Commission's decision *not* to make those facilities available as UNEs. In those circumstances – *i.e.*, in wire centers where the CLEC has obtained more than 10 DS1 loops, but DS3 transport is not available – the CLEC can and should avail itself of competitive supply. Far from placing an "artificial limit on the extent to which CLECs . . . can provide competitive alternatives to customers in sparsely populated areas," Cbeyond at 2, this result is necessary to "spread the benefits of facilities-based competition to all consumers, particularly small- and medium-sized enterprise customers," *TRRO* ¶ 3.

**B. The Commission May Not Eliminate the EELs Eligibility Criteria**

The Commission has long recognized the danger of EELs undercutting the special access market, a "mature source of competition in telecommunications." *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 18 (2000). To prevent that result, the Commission in 1999 insisted that EELs be available only to carriers that would use the facility to provide "a significant amount" of local exchange service. *Id.* ¶ 22. Although that limitation (and the safeguards to enforce it) were upheld by the D.C. Circuit, *see Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*"), the Commission replaced it in the *Triennial Review Order* with "architectural safeguards" that the Commission claimed would be easier to administer. *See Triennial Review Order* ¶¶ 591-611. In *USTA II*, the D.C. Circuit affirmed those safeguards as "reasonable," 359 F.3d at 592-93, and the Commission elected not to revisit them in the *TRRO*, *see TRRO* ¶ 230 n.644 (noting that "[t]he *USTA II* court affirmed our eligibility criteria, and we therefore are under no obligation to make any changes to them at this time").

Birch contends that the Commission should reconsider that determination and eliminate the *Triennial Review Order*'s EELs eligibility criteria, purportedly because the *TRRO*'s "direct prohibition on the use of UNEs exclusively for the provision of long distance services" eliminates the need for them. Birch at 7-8. This contention is mystifying. Far from eliminating the need for the EELs safeguards, it is the Commission's decision to bar UNEs for interexchange services that *creates the need* for them. As the Commission explained in the *Triennial Review Order* – in connection with its efforts to enforce the qualifying/non-qualifying distinction established there – EELs safeguards are necessary to prevent "'gaming'" (*i.e.*, "regulatory arbitrage") by carriers that wish to use UNEs exclusively for long-distance service. *Triennial Review Order* ¶ 591. And, although the qualifying/non-qualifying distinction is no longer in place, the Commission's decision to bar the use of UNEs for long distance has the same effect: it forecloses CLECs from using UNEs to provide long distance, thus necessitating EELs safeguards in order to give that limitation effect.

Birch nevertheless contends that the EELs criteria should be eliminated because they may prove difficult to implement. *See* Birch at 9. Yet the only evidence of this so-called difficulty is that ILECs and CLECs have not yet agreed in all cases "as to the language appropriate to implement" the criteria. *Id.* That is plainly no grounds on which to *eliminate* necessary rules, particularly where state commissions (and this Commission) are available under section 252 to serve as a backstop to arbitrate disputes that cannot be resolved through negotiations. And, as to Birch's unsubstantiated concern about the cost of audits to ensure compliance with the safeguards, *see id.* at 10, the Commission's rules provide that, "to the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit," *Triennial Review Order* ¶ 628. A CLEC that is complying with the Commission's rules thus need not be concerned with audit costs.

Like Birch, CTC also contends that the Commission should eliminate the EELs eligibility criteria, though it does so for a different reason. Whereas Birch appears to concede the validity of the Commission's bar on UNEs for long distance, CTC claims that the bar should be lifted – and that CLECs *should* be permitted to use UNEs "exclusively for long distance" – on the theory that, assuming the SBC/AT&T and Verizon/MCI mergers are consummated, there will be less competition in long distance. CTC at 9. This claim is utterly unfounded. As SBC and AT&T have documented in detail in connection with their application for transfer of control, the long-distance market is robustly competitive today and it will remain that way in the wake of the merger.[11] There is thus no basis on which to reconsider the Commission's decision to bar the use of UNEs for long distance.

CTC also wrongly asserts that the existence of EELs criteria is inconsistent with the *USTA II* court's decision to vacate the *Triennial Review Order*'s qualifying/non-qualifying services distinction. *See* CTC at 10-11. In fact, in *USTA II*, at the same time as it vacated the qualifying/non-qualifying distinction as inconsistent with the text of the 1996 Act, the D.C. Circuit directed the Commission to undertake a service-specific inquiry to determine whether requesting carriers were impaired without access to UNEs in providing long distance, and it strongly suggested that no such impairment finding could be made. As the court explained, regardless of whether the Commission could conclude that long-distance services are not "qualifying services" for purposes of unbundling, "[o]n remand, . . . the Commission will

[11] *See, e.g.*, Description of the Transaction, Public Interest Showing, and Related Demonstrations, *Merger of SBC Communications Inc. and AT&T Corp.*, WC Docket No. 05-65, at 63-67 (FCC filed Feb. 21, 2005); Joint Opposition of SBC Communications Inc. and AT&T Corp. to Petitions to Deny and Reply to Comments, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations*, WC Docket No. 05-65, at 23-53 (FCC filed May 10, 2005).

presumably turn to the issue of impairment . . . with reference to long distance service." 359 F.3d at 592. In doing so, moreover, the Commission "may well find none," as "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic." *Id.*; *see id.* at 593 ("the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that the CLECs are 'impaired' by lack of access to the element"); *see also CompTel*, 309 F.3d at 13, 14 (explaining that it was "far from obvious" that the Commission could lawfully permit the use of UNEs for nonlocal special access services, in the absence of an impairment finding for those services). The Commission's decision to bar UNEs for long distance, and to give effect to that determination by keeping the EELs safeguards in place, is thus fully consistent with the *USTA II* court's guidance.

CTC also requests in passing that the Commission revise the EELs criteria to permit a requesting carrier to access EELs "if it certifies that it will use the EEL in part to provide local *data* service," instead of local voice service. CTC at 11 (emphasis added). The Commission should do nothing of the sort. The entire point of the EELs eligibility criteria is to "focus on local *voice* service due to its verifiability and its role as the core competitive offering . . . in direct competition to traditional incumbent LEC service." *Triennial Review Order* ¶ 595 (emphasis added). To emphasize that need, the Commission titled one relevant section of the *Triennial Review Order* "Actually Providing Local Service to the Customer Over *Every* Circuit." *Id.* § VII.B.2.b.(ii) (emphasis added). And the Commission's rules expressly require (among other things) that, "for every 24 DS1 EELs or the equivalent, the requesting carrier must maintain at least one active DS1 interconnection trunk for the exchange of local voice traffic." *Id.* ¶ 607. CTC's request, however, would gut that requirement – as well as all others intended to ensure that the CLEC is a bona fide local voice competitor in the local exchange – and replace it with a toothless and ill-defined obligation to certify that some portion of the data traffic transmitted over the EEL terminates locally. This vague proposal is thus nothing less than an invitation to repudiate the EELs safeguards that the Commission successfully defended in the D.C. Circuit and that the Commission pointedly declined to reconsider in the *TRRO*. The proposal should be rejected out-of-hand.[12]

### C. The CLECs' Challenges to the *TRRO's* Business-Line-Count Rules Fail

The Commission's high-capacity loop and transport impairment tests depend in part upon the number of business lines in a wire center, and the *TRRO* accordingly provides clear instructions for how to calculate business lines. *See* 47 C.F.R. § 51.5; *TRRO* ¶ 105. The CLECs challenge these instructions, on the theory that they purportedly overstate the number of business lines in a given wire center and thus lead to a finding of non-impairment where CLECs are in fact impaired. These challenges are uniformly misguided.

The CLECs direct the bulk of their challenges at the Commission's decision to count digital lines, including ISDN and DS1 lines, on a voice-grade-equivalent basis, calculating DS1s as equivalent to 24 lines, and DS3s as equivalent to 672. *See* Birch at 13; CTC at 12-13. This analysis, the CLECs explain, assumes that all CLEC high-capacity lines will be fully utilized, an

[12] CTC is wrong to suggest that its proposal would encourage broadband deployment. *See* CTC at 11. On the contrary, it would forestall competitive deployment, by permitting carriers to free-ride on ILEC facilities for their high-capacity needs, thus circumventing the steps the Commission has taken in the UNE context to "deregulat[e] broadband and encourag[e] new investment." FCC Press Release, Commissioner Kevin J. Martin's Press Statement on the *Triennial Review* (Feb. 20, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatach/DOC-231344A7.pdf.

assumption they view as unreasonable and contradicted by the *TRRO*'s own assumptions elsewhere in the order. *E.g.*, Birch at 13; *see* CTC at 12-13 (noting that the *TRRO* concludes that a DS3 transport generates 8-11 times the revenue of a DS1 transport link, while the business-line definition counts every DS3 as 28 times a DS1) (citing *TRRO* ¶ 128 n.358). In addition, the CLECs stress that competitors use "DS1 UNEs for non-switched private line services" and/or "to provide Internet bandwidth," and they complain that these uses are not supposed to count *at all* when determining whether a wire center satisfies the relevant non-impairment criteria. Birch at 13-14; *see also id.* at 14-15 (contending that carriers cannot assess end-user charges (*e.g.*, a multi-line subscriber line charge) on a 64-kbps-equivalent basis, and thus that it is unfair to count UNE loops on that basis).

These claims misunderstand the nature of the criteria the Commission adopted in the *TRRO*, and the steps necessary to arrive at those criteria. The business-line counts utilized in the *TRRO* were part of the Commission's effort, for the first time, to draw inferences "from one market regarding the prospects for competitive entry in another." *TRRO* ¶ 43. The Commission thus relied on "correlation[s] between the number of business lines . . . in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area serviced via that wire center." *Id.* As the Commission put it (in the transport context), its aim in relying on business-line counts was to "abstract[] the economic characteristics of individual incumbent LEC wire centers" where competitors *have* deployed their own facilities, to determine wire centers "where competitive deployment is economic." *Id.* ¶ 90.

Critically, in undertaking such a correlative analysis and then applying its results, it is imperative that the Commission use a consistent line-count methodology, to ensure that it is comparing apples to apples. The key here, then, is to adopt a set of line-counting rules that the

Commission applies (a) when determining where CLECs have already installed fiber-based collocation; (b) when setting thresholds to determine where CLECs can be expected to deploy their own facilities; and (c) when applying those thresholds to determine where CLECs are (and are not) entitled to UNEs. And that is precisely what the Commission did. The wire center data it relied on for its correlative analysis – *i.e.*, to establish the business-line criteria incorporated in the Commission's non-impairment tests – "[were] based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops," with the latter two components measured on a 64-kbps-equivalent basis. *TRRO* ¶ 105 & nn.303-304; *see id.* ¶ 114 & n.322; *id.* ¶¶ 174-175; 47 C.F.R. § 51.5. It necessarily follows that the same line-counting methodology be used when determining whether those criteria are met.

The CLECs, however, would have the Commission revise its line-counting rules solely for purposes of (c) above – *i.e.*, solely for *applying* the criteria established in the *TRRO* – but not for purposes of (a) or (b) (*i.e.*, establishing those criteria). The CLECs' goal, of course, is to create a mismatch that would allow carriers to obtain high-capacity loops and transport as UNEs even *more* broadly than in the "overwhelming majority of markets" contemplated by the Commission. *Powell Statement* at 1. But if the Commission is going to revise its line-counting rules, it would be duty-bound to do so for purposes of (a) and (b) as well. In other words, it would have to start from scratch: it would have to collect new data, perform a new impairment analysis, and establish new wire center criteria based on the new line-counting rules the CLECs advocate here. And, assuming the Commission performed its correlative analysis correctly in the first place, the ultimate result would be unchanged. The CLECs provide no reason why the Commission should undertake such a time-consuming yet pointless exercise.

The remainder of the CLECs' challenges to the Commission's line-count rules fail for the same reason. Thus, for example, the CLECs complain that the Commission separately counts business access lines and residential lines in ARMIS, but it counts all UNE-L lines in this context, regardless of whether they are used to serve mass-market customers. *See* Birch at 15; CTC at 14-15. For one thing, as the CLECs themselves have stressed, due to the availability of UNE-P for the last decade, the number of UNE-L lines serving the mass market as of year-end 2003 (which is the relevant date for present purposes[13]) was not competitively significant.[14] Because UNE-L lines are not tracked as residential or business,[15] it therefore makes perfect sense to assume that all such lines are being used to serve business customers. In any case, the core point is that the correlative analysis conducted in the *TRRO* assumed all UNE-L lines were

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[13] *See* SBC Accessible Letter No. CLECALL05-044, at 3 (Mar. 17, 2005) (explaining that "SBC has elected to provide UNE data as of December 31, 2003 in order to be consistent with the ARMIS-based data" required by the Commission's rules).

[14] *See, e.g.*, Comments of the PACE Coalition, Broadview Networks, Grande Communications, and Talk America Inc., WC Docket No. 04-313, CC Docket No. 01-338, at II (FCC filed Oct. 4, 2004) ("there is no significant mass market competition today occurring from CLECs using the ILECs' analog unbundled loops in conjunction with competitively provided switching"). CTC misleadingly cites the UNE Fact Report 2004 (FCC filed Oct. 4, 2004) ("Fact Report") (at II-41), apparently for the proposition that, at the time of the *Triennial Review Order*, there was a substantial number of residential UNE-L customers. *See* CTC at 14. In fact, the Fact Report stresses that "the vast majority of these mass-market [UNE-L] lines were being provided to small business customers." Fact Report at II-41-42.

[15] CTC (at 15) wrongly infers from the SBC/Ameritech merger conditions – which required a discount on loops used to serve residential customers – that ILECs can identify which UNE loops are used to serve residential customers. SBC implemented that discount by requiring CLECs to track any UNE loops they used to serve residential customers, which they plainly had proper incentives to do. Here, by contrast, as the Commission has recognized, CLECs do not have incentives to provide competitive information and have repeatedly exhibited their unwillingness to do so. *See TRRO* ¶ 105 (noting that it is "extremely difficult" to obtain and verify CLEC competitive information). In view of this repeated failure on the part of the CLECs, Birch's contention that the Commission should simply ask CLECs to report actual voice switched access circuits cannot be taken seriously. *See* Birch at 17.

business lines. *See TRRO* ¶ 105. It follows that UNE-L lines must be counted the same way in applying the criteria resulting from that correlative analysis.

Finally, even apart from this logical failing in their challenges to the Commission's line-count rules, the CLECs are simply wrong to suggest that those rules "overstate[]" CLEC business lines in a given wire center. Birch at 13. On the contrary, the Commission's rules *understate* CLEC business lines, by completely ignoring the vast amount of CLEC fiber that bypasses the ILEC's network altogether. *See* Fact Report at III-28. Regardless of whether this exclusion is justified in the interest of a "simplified ability to obtain the necessary information," *TRRO* ¶ 105, there can be no serious dispute that the line counts authorized by the Commission's rules ignore a massive and growing amount of business served by CLECs. Thus, if the Commission determines to revisit its line-counting methodology along the lines advocated by the CLECs, it must likewise take steps – including demanding for the first time that the CLECs identify their facilities deployment on the record – to include the business lines that the Commission's rules exclude entirely.

### D. Birch's Challenge to the Transport Impairment Test Fails

As noted above, the Commission's transport impairment test for the first time claims to draw inferences "from one market regarding the prospects for competitive entry in another." *TRRO* ¶ 43. The Commission thus "relies on whether the wire centers defining a route's end-points have a particular number of incumbent LEC business lines *or* a particular number of fiber-based collocators," reasoning that "applying these measures in a disjunctive tandem will better capture actual and potential deployment than any single measure." *Id.* ¶ 94 (emphasis added).

Birch disputes the logic of the Commission's approach, arguing that "a transport test that looks at either fiber-based collocators *or* business lines, but not both in tandem, cannot adequately predict where requesting carriers are not impaired." Birch at 19. "A high number of fiber collocators," Birch reasons, "does not say anything about the level of demand for transport to or from that office." *Id.* at 20. Alternatively, while conceding that "[a] high number of business lines may indicate potential revenue or potential need for transport," it "does not address whether other factors such as rights of way or the cost of deploying fiber impair a CLEC's ability to deploy the needed facilities." *Id.*

Birch's contentions ignore the Commission's reasoning and, more importantly, the D.C. Circuit mandate that necessitated it. In the *Triennial Review Order*, the Commission adopted a route-specific analysis that centered on whether competitive deployment had *already* occurred on the route in question. *See* 359 F.3d at 575 (summarizing Commission's approach). In *USTA II*, however, the D.C. Circuit criticized the Commission for "simply ignor[ing] facilities deployment along similar routes when assessing impairment." *Id.* Furthermore, the court reaffirmed its *USTA I* holding that the critical inquiry is not whether CLECs have already deployed their own facilities in a given market, as the *Triennial Review Order* erroneously held, but rather whether they are *capable of competing* – *i.e.*, whether "competition is possible" – without UNEs in that market. *USTA I*, 290 F.3d at 422.

The Commission's approach to transport flows directly from that D.C. Circuit mandate. As the Commission saw it, "these complementary tests" – *i.e.*, fiber-based collocators and business-line density, applied in the disjunctive – will capture both "wire centers with . . . significant potential revenues and thus, the potential for further competitive build-out," *and* "wire centers with significant competitive fiber-based collocation, but with relatively few business lines, thus accounting for situations" where competitive alternatives are already present. *TRRO* ¶ 94. Leaving aside whether the Commission properly defined the market and/or established criteria that properly reflect the state of actual and potential competition in the market, there can be no serious question that the goal of capturing markets that are *suitable* for competitive supply is necessitated by the D.C. Circuit's mandates.

Birch, however, seeks to turn the clock back and return to the pre-*USTA II* framework in which the Commission expressly assessed impairment based on whether competitors had *already* deployed competitive facilities. In Birch's view, anything less than actual competitive deployment on a route means that CLECs are impaired without access to UNEs on that route. Indeed, Birch's own data (even assuming it is accurate) confirm this point. Birch complains that, as a result of the Commission's disjunctive test, CLECs are denied access to transport on certain routes that do not (yet) have multiple competitive alternatives. Birch's claim thus appears to be grounded in the complaint that a CLEC may not be entitled to UNE transport to and from wire centers that share the same competitive characteristics as wire centers in which multiple CLECs have deployed and are using their own facilities. *See* Birch at 21. It is exactly that result, however, that will encourage competitors to deploy their own facilities on routes that are capable of competitive supply, and it is exactly that result that the D.C. Circuit's mandates require.

Birch also complains that the Commission's approach to transport is inconsistent with its approach to loops (where wire centers must have both a minimum number of collocators and a minimum number of business lines). *See id.* at 18. If there is any inconsistency here, it must be resolved by correcting the Commission's analysis for loops – *i.e.*, by applying a disjunctive test in that context as well. In light of the D.C. Circuit's binding decisions, on no theory could the Commission abandon the disjunctive approach to transport and thereby again "simply ignore facilities deployment along similar routes." *USTA II*, 359 F.3d at 575.

### E. The Commission Properly Ruled That Non-Impaired Wire Centers Cannot Become Impaired

Under the *TRRO*, once it is determined that a wire center *does* meet the relevant non-impairment criteria for high-capacity loops and transport, its status cannot change. By contrast, a wire center that today does *not* meet those criteria can meet them in the future. In other words, once a wire center is non-impaired for purposes of high-capacity loops and transport, it remains that way. But a wire center that is impaired today can become non-impaired in the future. *See, e.g.*, 47 C.F.R. § 51.319(e)(3)(i), (ii).

The CLECs challenge this determination with the conclusory statement that it "contradicts the impairment analysis required by Section 251(d)(2) of the Act." Birch at 25; *see* CTC at 7. That is not so. As discussed above, the Commission's task in this proceeding was to determine where facilities are suitable for competitive supply. Where a wire center meets the Commission's criteria – by, for example, hosting a certain number of fiber-based collocators – CLECs do not need access to the facilities in question, and making them available as UNEs is contrary to the text and goals of the 1996 Act. That is so, moreover, whether those collocations are already in place today, or whether instead they are installed a year from now. Either way, it cannot be said that CLECs are impaired without access to high-capacity UNEs in that wire center, and CLECs accordingly are not entitled to them. The Commission's rules thus properly limit unbundling where wire centers meet the Commission's established criteria, regardless of when they first meet those criteria.

By contrast, it would make no sense for the Commission to rule that a wire center could become impaired in the future if it no longer meets the Commission's criteria in the future, even though it meets those criteria today. Thus, for example, where a wire center that meets a certain business-line threshold today drops below that threshold in the future, it is more than likely a result of *more* competition in the wire center, and thus more lines being served by CLECs that completely bypass the ILEC network. It would be perverse in the extreme for such a pro-competitive development – in a wire center where UNEs are *not* available – to result in the availability of UNEs. The CLECs provide no coherent rationale for such an illogical result, and there is none. Likewise, the CLECs' proposed rule could, in effect, give a CLEC an incentive to remove existing collocation arrangements in a given wire center – perhaps in exchange for another CLEC's agreement to remove such arrangements in another wire center – and thus to move *away* from facilities-based competition. The *TRRO* properly avoided a result so antithetical to the goals of the 1996 Act.

Nor is it the case that the Commission should revise its wire center criteria to account for the announced mergers of SBC and AT&T, on the one hand, and Verizon and MCI, on the other. *See* Birch at 23-24; CTC at 5-6. Again, the Commission's task here is to identify wire centers that are *suitable* for competitive supply, and the Commission has adopted a set of criteria that it believes does so. The pending mergers have no bearing whatsoever on the characteristics of wire centers that make them attractive to competitors. It would therefore be wholly arbitrary to determine that a future event – one that, incidentally, is dependent on regulatory approval from this Commission – will somehow yield impairment where there is none today.[16]

[16] For this reason, the Commission's wireless affiliate rules are beside the point. *See* Birch at 23. The Commission's goal here is not to determine "control" as between companies, but rather to measure the characteristics of wire centers that have demonstrated that they are suitable for competitive supply, and to determine other wire centers that share the same characteristics. More generally, CTC devotes much of its petition to challenging the public interest benefits of the proposed mergers. *See* CTC at 3-5. Those contentions – which in any event are wholly without merit – should be addressed in the dockets the Commission has established to review the mergers.

In addition, the *TRRO* properly ruled that CLECs are not impaired without access to entrance facilities, and thus that those facilities are not subject to unbundling. *See TRRO* ¶¶ 134-

### F. The Commission Should Take into Account Competitive Facilities That Bypass ILEC Central Offices

As explained above, the Commission's impairment criteria for dedicated transport classify wire centers according to whether they have a certain number of business lines *or* a certain number of fiber-based collocators. Iowa Telecom asks the Commission to adopt a third disjunctive criterion for determining when a wire center qualifies as Tier 1 or Tier 2 for purposes of the Commission's transport analysis: "the presence of at least four or three (respectively) competitive dedicated interoffice transport providers, each with a point of presence anywhere in the wire center." Iowa Telecom[17] at 4.

This recommendation is entirely sensible and should be adopted. The Commission's collocation-based transport trigger is based on the indisputable point that "a sufficient degree of such collocation indicates the duplicability of [fiber transport facilities] and, thus, a lack of impairment." *TRRO* ¶ 96. "Fiber-based collocation in a wire center," the Commission explained, "very clearly indicates the presence of competitive transport facilities in that wire center *and* signals that significant revenues are available from customers served by that wire center sufficient to justify the deployment of transport facilities." *Id.* (emphasis added).

141. CTC asks the Commission to undo that ruling, by declaring that *any* ILEC transmission facilities that terminate at a reverse collocation arrangement count as "dedicated transport" eligible for unbundling, regardless of the facilities the ILEC places at the CLEC's point of presence. CTC at 23-25. The fact of the matter, however, is that virtually *any* ILEC-provided entrance facility will terminate to an ILEC facility that is reverse-collocated at the CLEC's premises. It is presumably for this reason that the Commission has properly ruled that an ILEC-provided facility between the ILEC central office and a CLEC premises constitutes "dedicated transport" only where it terminates to "local switching equipment" that the ILEC has reverse-collocated. *Triennial Review Order* ¶ 369 n.1126. CTC's petition for reconsideration on this point should accordingly be denied.

[17] Petition for Reconsideration of Iowa Telecommunications Services, Inc., WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Mar. 28, 2005) ("Iowa Telecom").

Importantly, the Commission's conclusion on this point applies equally when the CLEC fiber is *near* the ILEC's central office as it does when it is actually *in* the central office. Yet the Commission's transport test wholly ignores the availability of alternative fiber that bypasses the central office, thus understating the actual competitive presence of CLECs in the market and thereby extending unbundling to wire centers where CLECs, even by the Commission's standard, are not impaired.[18]

Nor is this a mere quibble. Iowa Telecom itself explains that there are many competitive transport routes in its serving area on which it must still make UNE transport available, solely as a result of the underinclusiveness of the Commission's test. The Fact Report confirms that competitive carriers routinely rely on collocation "hotels" and that the amount of fiber that never touches an ILEC central office is accordingly vast. *See* Fact Report at III-28. The Commission should grant Iowa Telecom's petition for reconsideration to ensure that this substantial and growing evidence of actual competition is not excluded from the Commission's analysis.

[18] To be sure, SBC proposed that the Commission adopt collocation-based and business-line-based non-impairment triggers for transport that some might construe as superficially similar to those adopted by the Commission. But SBC's proposal was designed to identify where competitive fiber deployment was feasible, not simply where such deployment already has occurred. The Commission's triggers, in contrast, were based on an assessment of where alternative facilities already are deployed. Thus, the Commission justified the business-line thresholds it adopted for Tier 1 and Tier 2 wire centers on the grounds that over 90 percent of Tier 1 wire centers already contain four or more fiber-based collocations (and over 98 percent contain at least one fiber-based collocators), and approximately 70 percent of Tier 2 wire centers have three or more fiber-based collocators (and at least one fiber-based collocator is present in approximately 92 percent of such wire centers). *TRRO* ¶¶ 115, 119. Insofar as the Commission's triggers thus were intended to identify where deployment already has occurred, rather than where it is feasible as SBC proposed, the Commission's triggers should account for all competitively deployed fiber in a wire center irrespective of whether that fiber is collocated in an ILEC central office, as Iowa Telecom proposes.

## II. THE PETITIONS TO RECONSIDER AND/OR CLARIFY THE COMMISSION'S SWITCHING AND TRANSITION RULES SHOULD BE DENIED

### A. The Commission Properly Denied Access to Switching for All Requesting Carriers, Including Those That Serve Payphone Service Providers

After nearly a decade of ubiquitous narrowband unbundling, the *TRRO* properly found that CLECs are not impaired without switching, it further found that switch unbundling discourages facilities-based competition, and it accordingly declined to make switching (and, hence, UNE-P) available for CLECs seeking to serve any customer in any market. *See TRRO* ¶¶ 199-225.[19] APCC challenges that determination as it applies to one particular type of customer: payphone service providers ("PSPs"). As APCC sees it, CLECs cannot make a profit serving PSPs using a UNE-L strategy, and they are therefore entitled to ULS/UNE-P to serve those customers, even if ULS/UNE-P is not available to serve any other type of customers. *See* APCC[20] at 4-7. This claim fails for multiple reasons.

*First*, while APCC takes issue with the Commission's impairment determination, it ignores the Commission's reliance on its "at a minimum" authority. As the Commission observed, "[t]he record demonstrates the validity of concerns that unbundled mass-market switching discourages competitive LEC investment in, and reliance on, competitive switches." *TRRO* ¶ 220. In particular, the availability of unbundled switching both "discourage[s] [CLECs] from innovating and investing in new facilities" and "creates disincentives for competitive LECs to use those competitive switches that have been deployed." *Id.* The Commission thus

[19] *See also Triennial Review Order* ¶¶ 451-453 (concluding on a national basis that CLECs are not impaired without ULS to serve enterprise customers).

[20] Petition for Partial Reconsideration of the American Public Communications Council, Navigator Telecommunications, LLC, NII Communications, and Symtelco, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Mar. 28, 2005) ("APCC").

concluded that "*even if some limited impairment might exist in some markets*, we would decline to require unbundling of mass-market local circuit switching pursuant to our 'at a minimum' authority, based on the investment disincentives that unbundled local circuit switching, and particularly UNE-P, creates." *Id.* ¶ 218 (emphasis added).

In light of that determination, which neither APCC nor any other party challenges here, APCC's claims about the profitability of service to PSPs are beside the point. In the Commission's words, "even if some limited impairment might exist" for CLECs that seek to serve PSPs, it remains the case that making UNE-P available to those CLECs would "discourage[] [CLECs] from innovating and investing in new facilities," and "create[] disincentives for competitive LECs to use those competitive switches that have been deployed." *Id.* ¶¶ 218, 220. Those determinations are more than sufficient to mandate denial of APCC's request, and APCC's failure to challenge them here is dispositive of its petition for reconsideration.

*Second*, even apart from APCC's failure to challenge the Commission's "at a minimum" analysis, APCC's claim of impairment with respect to PSPs is predicated on the incorrect assumption that PSPs represent a "distinct market" and that CLECs necessarily are entitled to a profit when serving them. But no "reasonably efficient" CLEC would go into business for the sole purpose of serving PSPs, and APCC does not argue the contrary. Rather, reasonably efficient CLECs enter markets with the goal of "'providing the full range of services . . . to *all customers* supported by the marketplace.'" *TRRO* ¶ 25 (quoting *Triennial Review Order* ¶ 115 n.396) (emphasis added). And, in doing so, no carrier is entitled to a profit on each and every type of customer it serves. If that were so, the Commission would be besieged by CLEC claims that, even if they are not entitled to unbundled switching to serve the "mass market," they are entitled to UNE-P to serve individual slices of that market. Thus, for example, CLECs would argue that they need UNE-P for (i) single-person households, which tend to generate low volumes of calls; (ii) elderly residential customers, who tend not to order vertical features; (iii) second lines typically used for dial-up Internet access; and so on.[21] The Commission's impairment analysis need not and cannot be transformed into such a customer-by-customer analysis. Rather, the question in the *TRRO* was whether CLECs are impaired without switching when serving the "mass market." The Commission correctly concluded that they are not, *see TRRO* ¶¶ 204-217, and APCC's arguments about one narrow segment of that market provide no basis to reconsider that judgment.

*Third*, and in all events, the Commission properly ruled that APCC's cost and revenue data, which purportedly showed that facilities-based service to PSPs was unprofitable, "incorrectly compared" costs and revenues. *Id*.. ¶ 222 n.611. In particular, the cost side of APCC's data was based on "state-specific estimates taken from" Bell company *Triennial Review* filings in January 2003, but APCC had failed to establish that the revenue side of the equation was "necessarily related to the actual revenues carriers could earn in those states." *Id.* To be sure, APCC's petition for reconsideration purports to rectify this gap in its data – by asserting for the first time that its cost and revenue data were "almost" matched, APCC at 3, 13 – but the time for providing such new information has long since passed. In this respect, APCC fails to explain why APCC was unable to discover this new information and present it to the Commission in a

[21] APCC insists that PSPs "must be analyzed apart from the mass market" because they typically "order only basic dial tone and do not subscribe to any vertical features or Internet access service." APCC at 7. As the examples in the text illustrate, there are many customer types that share the same characteristics, yet the Commission properly considers them as part of the mass market.

timely fashion "through the exercise of ordinary diligence," as the Commission's rules require. *See* 47 C.F.R. § 1.429(b)(2).

APCC's cost and revenue data, moreover, suffer from additional flaws that confirm the Commission's decision not to rely upon it to find impairment. The revenue figure, for example, is wholly unreliable, as it is based on data from only three unspecified CLECs and is unaccompanied by any explanation of the methodology used to collect it. *See* APCC Reply Comments[22] at 10 n.12. Equally important, even assuming APCC's figures to be reliable, those figures show that CLECs can in fact profitably serve PSPs on a facilities basis in Michigan, which is one of only three states APCC appears to have studied. *See* APCC Dec. 7, 2004 Ex Parte[23] at 5. Those figures are thus consistent with APCC's admission elsewhere that, in some circumstances, CLECs can and do successfully serve PSPs using competitively deployed switches. *See* APCC Comments[24] at 18 & n.17. Thus, even if APCC were correct that the Commission was required to conduct an impairment analysis specifically with respect to PSPs – and, for the reasons discussed above, it is not – APCC is incorrect to suggest that the data before the Commission established impairment.

*Finally*, APCC wrongly insists that the Commission was bound to require ULS/UNE-P for PSPs, notwithstanding the absence of impairment and the disincentive to invest that would be

[22] Reply Comments of The American Public Communications Council, Datanet Systems, LLC, Ernest Communications, Inc., Navigator Telecommunications, LLC, NII Communications, NY Telsav, and Symtelco, LLC, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Oct. 19, 2004).

[23] Ex Parte Presentation: *The Need for UNE-P for the Payphone Exchange Service Market* (FCC filed on behalf of The American Public Communications Council Dec. 7, 2004).

[24] Comments of The American Public Communications Council, Datanet Systems, LLC, Ernest Communications, Inc., Navigator Telecommunications, LLC, NII Communications, NY Telsav, and Symtelco, LLC, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Oct. 4, 2004).

caused by such unbundling, on the theory that doing so would promote the widespread availability of payphone service as contemplated by the 1996 Act. *See* APCC at 15-19 (citing 47 U.S.C. § 276(b)(1)). Congress made impairment the "touchstone" of unbundling, *USTA I*, 290 F.3d at 425, and the Commission accordingly may not order unbundling without a finding of impairment. *See Iowa Utils. Bd.*, 525 U.S. at 388-89, 391-92, 397; *Supplemental Order Clarification* ¶ 16. Thus, as the Commission recognized in the order, if the Commission believes subsidized service to PSPs is necessary to fulfill the aims of section 276 – as APCC appears to contend – it must attempt to create those subsidies directly, using its authority under that provision. *See TRRO* ¶ 221 n.607. On no theory could the Commission force the ILECs alone to shoulder the burden of such a mandate.

### B. The Commission's Transition Plan Need Not Be Clarified and Should Not be Reconsidered

#### 1. The Commission Properly Denied Access to New UNEs in the Absence of Impairment As of the Effective Date of the *TRRO*

**A.** In the *Interim Order* that the Commission adopted in the wake of *USTA II*, the Commission required ILECs to continue providing mass-market switching and high-capacity loops and transport for a maximum of six months, pursuant to the terms of their existing interconnection agreements, regardless of any rights the ILECs might have – contractual or otherwise – to cease such provisioning. *See Interim Order* ¶ 21. At the same time, the Commission pointedly warned CLECs that, in the event the Commission ultimately decided not to unbundle mass-market switching and hence perpetuate the UNE-P, CLECs would not be permitted to continue adding new UNE-P lines. In particular, the Commission spelled out a proposed transition plan that would allow CLECs, "[f]or the six months following . . . the effective date of the [FCC's] final unbundling rules," to continue to use UNE-P to serve their *existing* customers at the applicable TELRIC rate plus one dollar. *Id.* ¶ 29. As the FCC stated, however, "this [proposed] transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates." *Id.* ¶ 29.

In the *TRRO*, the Commission adopted a transition plan that tracked the proposed plan it had laid out in the *Interim Order*, but that gave the CLECs an additional six months to convert their embedded base. Thus, the Commission granted CLECs a total of 12 months, starting from the effective date of the order (March 11, 2005), to "submit orders to convert their UNE-P customers to alternative arrangements." *TRRO* ¶ 199, and it ruled that incumbent LECs would be entitled to collect additional compensation – that is, one dollar over the applicable TELRIC rate – for ULS/UNE-Ps in service during that transition period, "upon the amendment of the relevant interconnection agreements, including any applicable change of law processes," *id.* ¶ 228 n.630. At the same time, as it had pledged to do in the *Interim Order*, the FCC made clear that this transition period applies *only* to the "embedded customer base." *Id.* ¶ 227. CLECs are not permitted to add any *new* ULS/UNE-Ps after the effective date of the *TRRO*. As the Commission held, the transition plan – which "govern[s] incumbent LECs' obligations following the effective date of th[e] Order," *id.* ¶ 18 n.52 – "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)," *id.* ¶ 227; *see id.* ¶ 5; *see also* 47 C.F.R. § 51.319(d)(2)(iii) ("Requesting carriers may not obtain new local circuit switching as an unbundled network element.").

This reading is confirmed, moreover, by the Commission's step of accelerating the effective date of the *TRRO*. Recognizing the need for "prompt action," the Commission implemented its rules under a sense of urgency, eschewing its normal 30-day-after-publication effective date, in order to minimize or avoid any further harm to the marketplace or the industry.

*TRRO* ¶¶ 235-236. The Commission's sense of urgency makes clear that the "nationwide bar" against adding new ULS/UNE-Ps is self-effectuating. Any other interpretation would run contrary to the Commission's extraordinary steps in expediting the effective date of the order and the reasons underlying that urgency.

**B.** The CLECs contend that, notwithstanding the plain language of the Commission's order and rules, the Commission should rule – in the guise of a "clarification" – that the Commission's transition plan *does* in fact "permit competitive LECs to add new UNE-P arrangements," for as long as they can drag out the interconnection agreement amendment process. *See*, *e.g.*, CTC at 16-17. They stress that the Commission "expect[ed] that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." *TRRO* ¶ 233 (footnote omitted). Because the changes required by the *TRRO* must be implemented in interconnection agreements, the argument goes, it must be the case that the Commission intended its "nationwide bar" on ULS/UNE-P to await revision of the myriad interconnection agreements under which the parties were operating at the time of the *TRRO*.

This contention is badly flawed. By its terms, paragraph 233 of the *TRRO* simply requires that parties "implement changes to their interconnection agreements *consistent with our conclusions in this Order*." *Id.* (emphasis added). The "conclusions in this Order" include the finding that CLECs are not "permit[ted]" to, and may not, "obtain" UNE-P after the order's effective date. *Id.* ¶¶ 199, 227, 233; 47 C.F.R. § 51.319 (d)(2)(iii). Thus, even if the CLECs are correct that paragraph 233 requires amendment of agreements to implement the prohibition on new adds as of March 11, it does not make the Commission's conclusion that CLECs cannot order new UNEs contingent on such amendments. Any other reading of paragraph 233 would render the *TRRO* hopelessly inconsistent and self-contradictory, saying in one breath that certain actions are not "permitted" and in the next that they are permitted indefinitely. And, of course, a conforming amendment is not necessary before a CLEC simply stops submitting new orders as the Commission's order requires.

Indeed, the CLECs' reading would render meaningless the Commission's language restricting the transition plan to the "embedded base." If the CLECs were correct – such that they are permitted to continue to add new mass-market ULS/UNE-Ps until their agreements are amended – the Commission would have had no reason to make clear that the transition plan does not allow such additions. Rather, the absence of a rule mandating unbundled switching would itself have foreclosed CLECs from adding new ULS/UNE-Ps, once their agreements were amended. The Commission went further, however, and specifically stated that, under the transition plan, which took effect March 11, CLECs are not "permit[ted] . . . to add new UNE-P arrangements." *TRRO* ¶ 227. The CLECs do not and cannot explain why the Commission would have included that language, had it intended to permit CLECs to continue adding UNE-P arrangements after the effective date of the order.

In this respect, CTC's reliance on the *Triennial Review Order*'s change-of-law discussion is mystifying. CTC claims that, because the *Triennial Review Order* directed that its rules – including certain of its rules limiting unbundling – must be incorporated into interconnection agreements in order to take effect, the Commission must have meant the same thing in the *TRRO*. CTC at 17-18. But the *Triennial Review Order* simply demonstrates that, when the Commission wants to require the parties to incorporate rules into their agreements prior to their taking effect, it knows how to do so. Here, it did precisely the opposite and specifically declined to incorporate or otherwise reference its ruling in the *Triennial Review Order*, thus confirming that the ban on UNEs in the absence of impairment is self-executing.[25]

Finally, CTC claims that reading the *TRRO* according to its terms – *i.e.*, to hold that CLECs may not "add new UNE-P arrangements" as of the effective date of the order, *TRRO* ¶ 227 – is "brazen[]." CTC at 18. That reading, however, has been adopted by the vast majority of state commissions and federal courts to consider the question. Indeed, state commissions in Florida, North Carolina, Louisiana, New Jersey, Texas, California, New York, Indiana, Ohio, Michigan, Kansas, Rhode Island, Maine, Massachusetts, Alabama, and Delaware have all rejected CLEC attempts to obtain new UNE-P arrangements after the effective date of the order.[26] State commissions that have ruled to the contrary, moreover, have been brought to heel

[25] The PACE Coalition appears to concede this point, claiming (correctly) that the *TRRO* "deviate[d]" from the transition plan in the *Triennial Review Order* and asking the Commission to reconsider that decision. PACE at 2; *see infra* Part II.4 (addressing this claim).

[26] Order, *Petition To Establish Generic Docket*, Docket No. 041269-TP (Fla. PSC May 5, 2005) ("*Florida Order*"), *available at* http://www.psc.state.fl.us/library//FILINGS/05/04404-05/04404-05.PDF; Order Concerning New Adds, *Complaints Against BellSouth Telecomms., Inc.*, Docket No. P-55, Sub 1550, 2005 N.C. PUC LEXIS 543 (N.C. Utils. Comm'n Apr. 25, 2005); Minutes of Open Session, *Pursuant to Special Order 48*, U-28131, at 3 (La. PSC Apr. 20, 2005), *available at* http://www.lpsc.org/_pdfs/_minutes/Minutes04-20-05.pdf; Order, *Implementation of the FCC's Triennial Review Order*, Docket No. TO03090705 (N.J. BPU Mar. 24, 2005), *available at* http://www.bpu.state.nj.us/wwwroot/telco/TOQ3090705_20050324.pdf; Proposed Order on Clarification, Approved as Written, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821 (Tex. PUC Mar. 9, 2005); Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, *Petition of Verizon Cal., Inc.*, A.04-03-014 (Cal. PUC Mar. 11, 2005) ("*California Commissioner's Ruling*"), *available at* http://www.cpuc.ca.gov/word_pdf/RULINGS/44496.pdf; Order Implementing TRRO Changes, *Ordinary Tariff Filing of Verizon New York Inc.*, Case 05-C-0203 (N.Y. PSC Mar. 16, 2005) ("*New York Order*"), *available at* http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/D9FC5211C1457EFA85256FC500768FF4/$File/05c0203.03.16.05.pdf?OpenElement; Entry, Complaint of Indiana Bell Tel. Co., Cause No. 42749 (Ind. URC Mar. 9, 2005) ("*Indiana Order*"), *available at* http://www.in.gov/iurc/procedural/library/2005/05_dockets/42749de_030905.pdf; Entry, *Emergency Petition of LDMI Telecomms., Inc.*, Case No. 05-298-TP-UNC (Ohio PUC Mar. 9,

quickly by the federal courts. Thus, three federal district courts have enjoined state commission decisions requiring BellSouth to provision new UNE-P orders after the effective date of the *TRRO*, each of them ruling that BellSouth had established a high likelihood of success on its claim that the *TRRO* forecloses new mass-market ULS/UNE-Ps after its effective date.[27]

These state commissions and federal courts are exactly right. The plain language of the *TRRO* and its accompanying rules forecloses CLECs from ordering new UNEs in the absence of impairment. The CLECs' request for "clarification" on this point should be rejected.

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2005), *available at* http://dis.puc.state.oh.us/CMPDFs/AL85HKAPM+LK+823.pdf; Order, *Application of Competitive Local Exchange Carriers*, Case No. U014303 (Mich. PSC Mar. 29, 2005), *available at* http://www.cis.state.mi.us/mpsc/orders/comm/2005/u-14303etal_03-29-2005.pdf; Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order, *General Investigation To Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement Also Known as the K2A*, Docket No. 04-SWBT-763-GIT (Kan. SCC Mar. 10, 2005), *available at* http://www.kcc.state.ks.us/scan/200503/20050310170539.pdf; Open Meeting, *Verizon RI Tariff Filing To Implement the FCC's New Unbundled (UNE) Rules*, Docket 3662 (R.I. PSC Mar. 8, 2005) ("*Rhode Island Meeting*"), *available at* http://www.ripuc.org/eventsactions/docket/3662page.html; Order, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682 (Me. PUC Mar. 17, 2005) ("*Maine Order*"), *available at* http://mainegov-images.informe.org/mpuc/orders/2002/2002-682o.pdf; Briefing Questions to Additional Parties, *Petition of Verizon New England, Inc. d/b/a Verizon Mass.*, D.T.E. 04-33 (Mass. DTE Mar. 10, 2005), *available at* http://www.mass.gov/dte/telecom/04-33/310memorbq.pdf; Order Dissolving Temporary Standstill and Granting in Part and Denying in Part Petitions for Emergency Relief, *Competitive Carriers of the South, Inc.*, Docket No. 29393 (Ala. PSC May 25, 2005), *available at* http://www.psc.state.al.us/29393/29393co3.pdf; Open Meeting, *Complaint of A.R.C. Networks, Inc.*, Docket No. 334-05 (Del. PSC Mar. 22, 2005) ("*Delaware Order*").

[27] *See BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, No. 3:05-CV-16-JMH (E.D. Ky. Apr. 22, 2005); *BellSouth Telecomms., Inc. v MCImetro Access Transmission Servs., LLC*, No. 1:05-CV-0674-CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005) ("*BellSouth Georgia Order*"); *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, No. 3:05CV173LN, 2005 WL 1076643 (S.D. Miss. Apr. 13, 2005) ("*BellSouth Mississippi Order*").

### 2. The Commission Had Ample Authority To Prohibit New Orders As of the Effective Date of the Order

In addition to its claim that the Commission did not really intend to rule that "competitive LECs [may not] add new UNE-P arrangements" as of the effective date of the order, *TRRO* ¶ 227, CTC also claims that the Commission lacked authority to adopt such a rule, on the theory that the Commission "lacks the authority under the Act to interfere with contracts negotiated and arbitrated under sections 251 and 252 of the Act," CTC at 19. That is nonsense.

As an initial matter, this Commission plainly enjoys plenary authority to implement the 1996 Act, including its unbundling mandates. *See Iowa Utils. Bd.*, 525 U.S. at 380 (the statute "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"). That is exactly what the FCC has done here. It has promulgated rules that implement the 1996 Act – *i.e.*, no new UNE orders in the absence of impairment as of the effective date of the *TRRO*, regardless of the content of particular agreements.

Nor is it the case that the mere existence of interconnection agreements themselves prevented the Commission from taking that step. Those agreements are in no sense ordinary private contracts. Rather, they are instruments of federal regulation that ILECs are *required* to enter into, that are subject to extensive regulatory oversight, and that state commissions must enforce according to binding FCC regulations. *See, e.g.*, *e.spire Communications, Inc. v. New Mexico Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) ("An interconnection agreement is not an ordinary private contract. . . . An interconnection agreement is not to be construed as a traditional contract but as an instrument arising within the context of ongoing federal and state regulation."); *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) (interconnection agreements are a " 'creation of federal law,' " and are "the vehicles chosen by Congress to implement the duties imposed in § 251"). Moreover, the reason that those agreements required access to UNE-P in the first place is that the Commission had repeatedly perpetuated unbundled access to switching notwithstanding the language of the 1996 Act and binding judicial precedent. In those circumstances, once the Commission finally (and properly) recognized that switching cannot be unbundled under the Act, it was entirely appropriate, if not compelled, for the Commission to put a halt to new ULS/UNE-P orders.

Indeed, the Supreme Court has long held that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *Callery Props.*, 382 U.S. at 229. Federal agencies thus have "general discretionary authority to correct [their] legal errors." *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992); *see Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989) ("the Supreme Court and other courts have recognized an implied authority in . . . agencies to reconsider and rectify errors"). The Commission's decision to give effect to its determinations as of the effective date of the order plainly falls within that discretion. *See BellSouth Georgia Order*, 2005 WL 807062, at *2 (holding that it was "particularly appropriate" for the Commission to require immediate implementation of its new rules because it "was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs").

Independently, the so-called *Mobile-Sierra* doctrine also gives the Commission the authority to override existing interconnection agreements.[28] That doctrine authorizes the Commission "to modify . . . provisions of private contracts when necessary to serve the public interest."[29] Even assuming interconnection agreements amount to "private contracts" under the

[28] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

[29] *E.g.*, *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (upholding the Commission's finding that contracts containing international settlement rates

*Mobile-Sierra* doctrine, the Commission made such a public interest determination here, ruling that continued use of the UNE-P was contrary to the public interest because it "hinder[ed] . . . genuine, facilities-based competition." *TRRO* ¶ 218; *see id.* ¶ 236 (finding that the "public interest" supports making rules effective on March 11). Thus, as one federal court has explained, "the FCC's order reflects the [Commission's] finding that the bar on new [UNE Platform] switching orders should take effect immediately since the continued use of the UNE-Platform 'hinder[ed] . . . genuine, facilities-based competition['] and was thus contrary to public policy." *BellSouth Mississippi Order*, 2005 WL 1076643, at *6 n.9 (quoting *TRRO* ¶ 218) (alterations in original). Under *Mobile-Sierra*, the Commission had ample discretion to make that determination and thus to compel CLECs to cease ordering new ULS/UNE-Ps as of the effective date of the order, notwithstanding any language to the contrary in their interconnection agreements.

Finally, contrary to CTC's apparent understanding, the Commission has on numerous occasions made its unbundling rules effective irrespective of the terms of existing agreements. Thus, for example, as noted above, in the *Interim Order*, the Commission required ILECs to continue to provide mass-market switching and high-capacity loops and transport for a maximum of six months, pursuant to the terms of their existing interconnection agreements, regardless of any rights the ILECs might have had – contractual or otherwise – to cease such provisioning. *See Interim Order* ¶ 21. Likewise, in the *Local Competition Order*, the Commission, having concluded that the LEC practice of charging CMRS providers for terminating LEC-originated traffic was inconsistent with section 251(b)(5), held that, "*[a]s of the effective date of this order,*

exceeding FCC benchmarks were not in the public interest); *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge." *See Local Competition Order*, 11 FCC Rcd 15499, 16016, ¶ 1042 (1996) (subsequent history omitted). In that same order, the Commission adopted rules requiring that the rates for transport and termination be symmetrical and ordered that, pending re-negotiation (or arbitration), *existing* agreements would be deemed, as of the effective date of the order, to adhere to those newly promulgated rules. *See id.* ¶ 1094.

In short, the Commission's decision to give its rules effect as of the effective date of the *TRRO* is amply justified and fully consistent with Commission precedent. It need not be reconsidered here.

### 3. The Commission Properly Refused To Permit CLECs To Add New Switching UNEs for Existing Customers As of the Effective Date of the *TRRO*

The CLECs also ask the Commission – again in the guise of a requested "clarification" – to permit CLECs to order mass-market ULS/UNE-P to serve "additional lines at an existing location or new lines at a new location," provided those new ULS/UNE-P lines are for an existing customer. CTC at 22; PACE[30] at 10. Here again, however, there is nothing to clarify. The *TRRO* plainly states that the transition period "does not permit competitive LECs to add new UNE-P *arrangements* using unbundled access to local circuit switching pursuant to section 251(c)(3)." *TRRO* ¶ 227 (emphasis added); *see also id.* ¶ 5 ("This transition plan . . . does not permit competitive LECs to add new switching UNEs."). Where a CLEC orders a new UNE-P line to serve an existing customer, it is in fact ordering a new switch port, combined with a UNE

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[30] Petition for Reconsideration and/or Clarification of the PACE Coalition, WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Mar. 28, 2005).

loop and shared transport – *i.e.*, a "new UNE-P arrangement." Under the terms of the *TRRO*, such arrangements are foreclosed after the effective date of the FCC's order.

The text of the Commission's rules confirms this reading. Although section 51.319(d)(2)(iii) of those regulations permits a CLEC to continue to use unbundled switching "to serve its embedded base of end-user customers," the last sentence of that provision unequivocally states that "*[r]equesting carriers may not obtain new local switching as an unbundled network element.*" 47 C.F.R. § 51.319(d)(2)(iii) (emphasis added). The italicized language thus operates to confine the authorization to serve the embedded base of customers to *existing* UNE-P arrangements; any "new" such arrangement is foreclosed by the text of the FCC's rules, regardless of whether that new arrangement is intended to serve an existing or a new customer.

Any other result, moreover, would make no sense. The point of the transition period is to force CLECs to transition their embedded base of mass-market ULS/UNE-P customers – customers that were obtained pursuant to rules that were vacated three separate times – to alternative serving arrangements. It makes no sense to conclude that, even as CLECs are required to transition their *embedded* base of customers, they are permitted to order brand new lines to serve the same customers, using the same discredited rules.

Contrary to PACE's claim (at 10-11), the overwhelming weight of authority confirms this view. Thus, for example, the Federal District Court for the Northern District of Georgia has explained:

> The FCC . . . created strict transition periods for the "embedded base" of customers that were currently being served using these facilities. Under the FCC transition plan, competitive LECs may use facilities *that have already been provided* to serve their existing customers for only 12 months and at higher rates than they were paying previously. *See* [*TRRO*] ¶¶ 142, 195, 199, 227. The FCC made plain that these transition plans applied *only* to the embedded base and that competitors were "not permit[ed]" to

> place new orders. *Id*. ¶¶ 142, 195, 199. The FCC's decision to create a limited transition that applied only to the *embedded base* and required higher payments *even for those existing facilities* cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECS could order new facilities and did not specify a rate that competitors would pay to serve them.

*BellSouth Georgia Order*, 2005 WL 807062, at *1 (emphasis added); *see also BellSouth Mississippi Order*, 2005 WL 1076643, at *3, *6 (stating that "the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change-of-law provisions in the parties' interconnection agreements" and precluding, without reservation, the Mississippi PSC from "enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching").

Likewise, in California, the state commission held that the *TRRO* "clearly bars" "any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services." *California Commissioner's Ruling* at 7.[31] Indeed, the California commission found that "the *only* reasonable interpretation of the prohibition of 'new service arrangements' is that this term embraces any arrangements to provide UNE-P services to any customer after March 11, 2005." *Id*. at 8 (emphasis added). Thus, while the California commission deferred implementation of the FCC's "nationwide bar" on UNE-P for a short time (until May 1) to allow CLECs to negotiate change-of-law amendments to reflect the cut-off of new UNE-P arrangements for existing customers, its order confirms that CLECs are not entitled to order new ULS/UNE-Ps for existing customers during the FCC's 12-month transition period. *See id.* at 7; *see also Maine Order* at 5 (holding without reservation that ILECs have "no

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[31] On March 17, 2005, the California Public Utility Commission voted to adopt the Assigned Commissioner's ruling. *See* Opinion Confirming the Assigned Commissioner That Granted in Part the Motion for Emergency Order Granting Status Quo for Unbundled Network Element Platform Orders, *Petition of Verizon California Inc.*, App. No. 04-03-014 (Cal. PUC Mar. 17, 2005).

obligation to provide CLECs with access to the delisted UNEs and that the transition plan does not permit CLECs to add new de-listed UNEs"); *Indiana Order* at 6 ("[i]f mass market circuit switching is no longer an element required to be unbundled pursuant to sections 251/252 of the Act, it can therefore no longer be required to be unbundled within the context of an interconnection agreement for the stated purposes of sections 251/252").[32]

Relatedly, PACE also contends that the Commission should "clarify" that its mass-market ULS/UNE-P transition plan merely requires CLECs to *place orders* to convert existing ULS/UNE-P lines to alternative arrangements within 12 months, and that CLECs may continue to use those UNE-P lines indefinitely, until those orders are filled. PACE at 9. That is obviously incorrect. The Commission plainly stated:

> We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order. . . . [C]arriers have twelve months from the effective date of this order to modify their interconnection agreement. . . . *By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNE to alternative facilities or arrangements*.

*TRRO* ¶ 227 (emphasis added). The Commission made the same point with respect to high-capacity facilities. *See*, *e.g.*, *id.* ¶ 143 ("At the end of the twelve-month period, requesting carriers must transition the affected DS1 or DS3 dedicated transport UNEs to alternative facilities or arrangements."). The Commission thus plainly and properly contemplated that CLECs must *complete* the transition of the embedded base within 12 months of the effective date of the order. PACE's suggested "clarification" of the order on this point should accordingly be denied.

[32] State commissions in, among other states, New York, Florida, Delaware, and Rhode Island have likewise declined CLEC requests to require ILECs to provide new UNE-P arrangements for existing customers following the effective date of the *TRRO*. *See New York Order*, *Florida Order*, *Delaware Order*, *Rhode Island Meeting*.

#### 4. The Commission Should Not Extend the Transition Period or Alter the Rates That Apply During That Period

CTC asserts in passing that the Commission should "disavow" the modest increased rates the Commission established for the embedded base of UNEs during the transition period. CTC at 21. But the only rationale CTC offers for this proposal makes no sense. CTC stresses that unbundling rules "are a default mechanism that leaves the parties free to negotiate alternative arrangements." *Id.* That remains true today – the rules set out in the *TRRO* are a "default mechanism," and the parties remain free to negotiate around them. *See TRRO* ¶ 228 ("Of course, the transition mechanism adopted here is simply a default process, and, pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period."). If the parties are unable to reach agreement, however, the "default" rules apply, including the increased transitional rates established in the order.

For its part, the PACE Coalition asks the Commission to jettison the mass-market ULS/UNE-P transition plan altogether and instead to subject ILECs to an extended transition plan of more than two years. PACE at 3, 7. The Commission can do no such thing. ILECs have already been required to provide UNE-P for close to a decade, pursuant to impairment findings that disregarded the terms of the Act and have never once been successfully defended in court. In the *TRRO*, moreover, the Commission expressly ruled that CLECs are *not* impaired without access to switching and that UNE-P "hinder[s] . . . genuine, facilities-based competition." *TRRO* ¶ 218. In light of those findings – which, notably, PACE does not contest – the Commission has no authority to require ILECs to provide access to switching for the multiyear transition period that PACE proposes.

PACE's suggestion that such a multiyear period is necessary to "allow for a smooth transition" is highly disingenuous. PACE at 4-5; *see id.* at 8 (contending that the transition plan "put[s] millions of residential and small business customers at risk of service disruption"). As the Indiana commission has observed, in the wake of the *TRRO*, "ILECs and CLECs are free to negotiate the continued provisioning of UNE-P-like service." *Indiana Order* at 7. As noted at the outset, many carriers are doing exactly that – SBC alone has negotiated approximately 60 of commercial arrangements covering close to one-third of its UNE-P lines in service; it is presently in negotiations with many more CLECs; and it is offering an interim arrangement to ensure that CLECs can avoid any service disruption. Where a CLEC cannot reach agreement, moreover, it may rely on resale pursuant to section 251(c)(4), and/or it may take advantage of the wealth of intermodal and intramodal competitive alternatives that led the Commission to promulgate a "nationwide bar" on new orders of UNE-P in the first place.

Equally important, CLECs have known *at least* since the D.C. Circuit's *USTA II* decision, in March 2004, that UNE-P was likely to be invalidated. As of the August 2004 *Interim Order*, moreover, CLECs knew that the Commission was contemplating a six-month transition plan that would "apply only to the embedded customer base, and [would] not permit competitive LECs to add new customers at these rates." *Interim Order* ¶ 29. CLECs have thus had ample time to plan for a transition away from UNE-P, and, even now, they have ample alternatives to effectuate that transition.

## III. THE COMMISSION MAY NOT PERMIT THE USE OF UNES FOR WIRELESS SERVICE

Acting pursuant to the unambiguous mandate of *USTA II* – which reversed the Commission's prior decision to permit wireless carriers access to UNEs – the *TRRO* puts in place a firm ban on the use of UNEs for wireless service. The Commission explained that, because "[t]he Commission repeatedly has found the mobile wireless service market to be competitive," *TRRO* ¶ 36 n.106, "the costs of requiring . . . unbundling" for use in that market far "outweigh[]" any "incremental benefits, *id.* ¶ 36. The Commission further stressed that "unbundling can create disincentives" for *all* carriers "to deploy innovative services and facilities, and is an especially intrusive form of economic regulation – one that is among the most difficult to administer." *Id.* Because wireless services are *already* competitive, the Commission properly declined to extend such "intrusive" regulation to that market.

T-Mobile's petition for reconsideration professes confusion over the import of the order on this point, and it asks the Commission to reconsider its decision "to the extent necessary" to permit CMRS carriers to obtain UNEs – in particular, transmission links between base stations and incumbent LEC central offices, as well as interoffice transport – to provide wireless service. T-Mobile[33] at 2. Astonishingly, however, T-Mobile makes this request *without a single mention of the D.C. Circuit's decision on this point in USTA II*. As noted immediately above – and as the Commission stressed in the *TRRO* (¶ 35) – the D.C. Circuit *reversed* the Commission's decision in the *Triennial Review Order* to do exactly what T-Mobile requests here: permit CMRS carriers to use UNEs. In doing so, the court stressed that wireless competition had flourished without UNEs, resulting in a "rapidly expanding and prosperous market." *USTA II*, 359 F.3d at 576. In such circumstances, the court could conceive of no sound justification for unbundling: "Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling." *Id.*[34]

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[33] Petition for Reconsideration of T-Mobile USA, Inc., WC Docket No. 04-313, CC Docket No. 01-338 (FCC filed Mar. 28, 2005) ("T-Mobile").

[34] The *USTA II* court made the same point, moreover, with respect to broadband and the use of EELs. *See USTA II*, 359 F.3d at 582 ("we agree with the Commission that robust intermodal competition from cable providers – the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order

The *USTA II* court's holding on this point, moreover, flowed directly from its decision to vacate the Commission's line-sharing rules in *USTA I.* There, after emphasizing the Commission's findings that broadband is competitive and that cable modem providers are in fact the leaders in that market, the court stressed that "mandatory unbundling comes at a cost" and that it would be inconsistent with the "goals of the Act" to impose that cost in circumstances in which a market was already competitive and thus unbundling would not create consumer benefit. 290 F.3d at 429. In the court's words, "nothing in the Act appears a license to the Commission to inflict on the economy [these sorts of costs] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition." *Id.*

The D.C. Circuit's rulings – which make clear that the Commission is foreclosed from extending unbundling to competitive markets – are dispositive on this point. In light of those rulings, along with the Commission's unchallenged determination that wireless service is "competitive," *TRRO* ¶ 36 n.106, the Commission is foreclosed from permitting T-Mobile and other wireless carriers to obtain access to UNEs. T-Mobile's petition does not – because it cannot – contest the point.

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of 60% – means that even if all CLECs were driven from the broadband market, mass-market consumers will still have the benefits of competition between cable providers and ILECs") (citation omitted); *id.* at 585 ("[W]e find that even if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment . . . . We read the Commission as concluding that, at least in the future, line sharing is not essential to maintain robust competition in this market, a conclusion based on permissible considerations and supported by evidence in the record."); *id.* at 592 ("competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic"); *id.* at 593 ("the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that the CLECs are 'impaired' by lack of access to the element").

Nor is it relevant (or even correct) that CMRS providers need access to UNEs – and the price break that such UNEs afford – so they can "compete as a replacement for wireline service." T-Mobile at 5. Even assuming the D.C. Circuit had left the Commission room to extend UNEs into wireless – and it did not – the fact of the matter is that CMRS providers *already* compete as a replacement for wireline service. Industry-wide, approximately 20 million new wireless subscribers are being added annually,[35] whereas wireline access lines are declining.[36] And, critically, an increasing share of wireless subscribers are abandoning their wireline phones altogether.[37] Nationwide, the percentage of wireless users that have given up wireline service has grown to 7-8 percent,[38] and approximately 2.7 million additional wireless subscribers are now giving up their wireline phones each year.[39] An even larger percentage of young consumers – which will make up the next generation of homeowners – are disconnecting their wireline

[35] *See*, *e.g.*, CTIA, *CTIA's Semi-Annual Wireless Industry Survey Results, June 1985 – December 2003*, http://files.ctia.org/pdf/CTIA_Semiannual_Survey_YE2003.pdf. *See* Ind. Anal. & Tech. Div., WCB, FCC, *Local Telephone Competition: Status as of December 31, 2003* at Table 13 (June 2004) ("*June 2004 Local Competition Report*").

[36] *See June 2004 Local Competition Report* at Table 1.

[37] *See generally* Glen Campbell, *et al.*, Merrill Lynch, Investext Rpt. No. 7453992, Voice Over Broadband – The Challenge from VoIP in the Resident – Industry Report at *19 (June 24, 2003) ("Declining costs and improving quality in wireless make it inevitable that wireline minutes will continue to migrate to wireless – and that an increasing proportion of customers will look to disconnect wireline service entirely."); Jason Bazinet, *et al.*, JP Morgan, *U.S. Telecommunications: The Art of War* at 7 (Nov. 7, 2003) ("an increasing number of consumers are turning off their wireline phone altogether and using their wireless phone as their primary phone.").

[38] Adam Quinton, Co-Head of Global Telecom Services Research, Merrill Lynch, prepared witness testimony before the Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee, Washington, DC (Feb. 4, 2004) ("an estimated 7% of telephone users only have a cell phone"); Blake Bath, Lehman Brothers, *Consumer VoIP Threat Overdone* at Figure 2 (July 1, 2004) ("*July 2004 Lehman Brothers VoIP Report*") (estimating 7% displacement in 2003 and 8% displacement in 2004).

[39] *See July 2004 Lehman Brothers VoIP Report* at Figure 2.

service (or never purchase wireline service in the first place), which makes it likely that the rate of substitution will increase even further in the future.[40] Analysts thus predict that, within four years, approximately 22 million access lines – approximately 13 percent of total access lines – will be displaced by wireless.[41]

T-Mobile nevertheless claims that UNE access to transmission facilities would "reduce its monthly costs of service" and thereby permit it to compete more effectively. T-Mobile at 6. But that claim goes only to the rock bottom rates that the Commission's TELRIC rules mandate; it has nothing to do with whether the Commission should permit the artificially managed competition that unbundling represents to infect the highly competitive wireless market. The question is not whether T-Mobile is entitled to increased margins in providing wireless service. Rather, it is whether UNEs are necessary for competition to thrive in the wireless market. As the D.C. Circuit has made clear, the Commission's own findings demonstrate that they are not. The *TRRO*'s holding on this point is thus plainly correct – indeed, it is mandated by the binding decisions of the D.C. Circuit – and it should not be reconsidered.[42]

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[40] *See, e.g.*, Adam Quinton, *et al.*, Merrill Lynch, *Telecom Services: Unraveling Revenues* at 5 (Nov. 20, 2003) ("[W]e believe that demographic trends favor wireless. . . . So, as the US population ages, more young people are likely to become wireless subscribers – and either displace the purchase of a wireline service with wireless or cut the cord on an existing line."); Scott Ellison, IDC, *U.S. Wireline Displacement of Wireline Access Lines Forecast and Analysis, 2003-2007* at 7 (Aug. 2003) ("The first communications services purchased by youth and young adults are now often wireless services. Adoption of wireless by teenagers is increasingly being translated into forgoing traditional primary access lines when such wireless users go to college or otherwise establish their own households.").

[41] *See* Scott Ellison, IDC, *U.S. Wireless Displacement of Wireline Access Lines Forecast and Analysis¸ 2003-2007* at Table 9 (Aug. 2003); *see also* Clint Wheelock, In-Stat/MDR, *Cutting the Cord: Consumer Profiles and Carrier Strategies for Wireless Substitution* at 4 (Feb. 2004) (In-Stat/MDR predicts, in its "Base Scenario Forecast," which is the "most likely outcome," that 29.8% of wireless subscribers will not have a landline by 2008.).

[42] Because *USTA I* and *USTA II* and the competitive conditions in the marketplace foreclose T-Mobile's plea for access to UNEs, the Commission need not consider its request that

**CONCLUSION**

Iowa Telecom's petition for reconsideration should be granted. The remainder of the petitions for clarification and/or reconsideration should be denied.

Respectfully submitted,

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June 6, 2005

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the Commission revise its EELs eligibility rules to suit CMRS providers. *See* T-Mobile at 9-10. In the unlikely event the Commission reaches this issue, it should reject T-Mobile's claim for the reasons set forth in SBC's response to the petitions for reconsideration of the *Triennial Review Order*. *See* Comments of SBC on Petitions for Reconsideration, CC Dockets 01-338, 96-98 & 98-147, at 21-23 (FCC filed Nov. 6, 2003).

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 6th day of June 2005, I caused a copy of the foregoing Response of SBC Communications to Petitions for Clarification and/or Reconsideration to be served upon each of the parties on the attached service list by first-class mail, postage prepaid.

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